[CONFIDENTIAL COMMITTEE PRINT]

MATERIALS FOR POSSIBLE INCLUSION IN COMMITTEE REPORT ON S. 1898

FOR USE OF MEMBERS OF

HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

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MATERIAL PREPARED FOR USE OF COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE FOR POSSIBLE INCLUSION IN COMMITTEE REPORT ON S. 1898, AS PROPOSED TO BE AMENDED

This material is in explanation of the proposed committee substitute for S. 1898 (as such substitute appears in the committee print of June 3, 1960)

TABLE OF CONTENTS

SECTION 2—CONDITIONAL GRANTS

The purpose of this section is to amend the Communications Act of 1934 to counteract the effect of a rule adopted by the FCC.

Section 307(d) of the act provides that no broadcast license shall be granted for a longer term than 3 years; and the FCC can, of course, fix a shorter period. The Commission, however, has adopted a rule that all broadcast licenses shall be granted for a term of 3 years. Thus, it has placed itself in a position where it cannot, without formally changing its rule in a time-consuming proceeding, grant a broadcast license for a term shorter than 3 years. The public interest may require the granting of shorter term conditional licenses in order to afford the FCC a more frequent review of the licensees' performance.

The primary purpose of this provision is to make it possible for the Commission, without the necessity for instituting a rulemaking proceeding, to grant licenses in individual cases for a shorter time than that prescribed in the rule above referred to.

SECTION 3—PREGRANT PROCEDURE

This section rewrites section 309 of the Communications Act of 1934. Prior to 1952, this section of the act provided that if the Commission upon the examination of an application was able to find that the public interest, convenience, or necessity would be served thereby, it should grant such application. If, however, the Commission could not make such a finding, it was required to give notice to the applicant and afford him an opportunity for hearing.

In 1952 the Congress amended section 309 to include two new concepts. The first was contained in a new section 309(b) and requires the Commission, in all situations where it is unable to make the public interest findings based on an examination of the application alone, to notify the applicant and other parties in interest of the grounds and reasons why it cannot find that the public interest, convenience or necessity will be served by granting the application prior to designating such application for hearing. Furthermore, this section requires the Commission to provide an opportunity to the applicant to reply to the objections raised in the above-described notice. This procedural step required in all instances has proved to be cumbersome, timeconsuming, and in many instances of no value whatsoever.

The second procedural concept added by the 1952 amendments was the so-called protest procedure, contained in new section 309(c), which was amended in 1956. This subsection provides that in any case where the Commission had granted an application without a hearing any party in interest may, within 30 days after said grant without a hearing, protest the Commission's action. Moreover, it requires that this protest should be served upon the grantee and should contain such allegations of facts as will show the protestant to be a party in interest and should specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made. The Commission is required to rule upon this protest within a 30-day period, making findings as to sufficiency of the protest and, where it finds that the protest is sufficient, designating the matter for hearing upon issues relating to all of the matters specified in the protest as grounds for setting aside the grant, except in cases where after oral argument the Commission finds that even if the facts were as alleged, no grounds exist for setting aside the grant is presented. The provisions of this subsection have been broadly interpreted by the courts and have proved to be a most effective device for delaying the disposition of Commission business.

Both the FCC and FCC Bar Association have been seriously concerned by the procedural abuses which have arisen out of this subsection of the act. Accordingly, both of these organizations submitted legislative proposals designed to remedy these difficulties. S. 1898 was introduced upon request of the FCC Bar Association. After hearings on that proposal and a proposal submitted by the FCC, the bar association and the FCC held a series of discussions and agreed upon amendments to S. 1898. As amended and passed by the Senate, S. 1898 represented the views of both the FCC and the FCC Bar Association.

In the committee substitute (which deals with several subjects) section 3 relates to the subject matter of S. 1898 as it passed the Senate. Section 3 is not basically different from the bill approved by the Senate. The provisions have, however, been rearranged and revised in a manner which we believe achieves greater clarity. Section 3 of the committee substitute would delete the mandatory notice prior to designation for hearing now included in 309(b) of the act and would also substitute for the provisions of present section 309(c) a procedure which would authorize a petition to deny to be filed prior to action on the application by the Commission. This would be accomplished by requiring the Commission in all broadcast and common carrier cases and certain other cases to hold applications for not less than 30 days after notice of acceptance for filing has been published. This new procedure would require the Commission to consider such petitions to deny in connection with its consideration of these applications and, where upon an examination of the application and the petition to deny or any other pleadings before it, the Commission is not able to make the public interest findings required, it would designate such application for hearing. We believe that these procedural safeguards will provide an adequate opportunity for proper parties to protect their interests in an orderly and logical manner without subjecting the Commission procedures to the abuses which are inherent in the present protest procedure.

Section 309(a), in the committee substitute, contains the criteria which the Commission must apply in the consideration of all applications to which section 308 of the act applies. When the Commission, upon examination of the application and such other matters as it may officially notice, finds that the public interest, convenience, and necessity will be served by the granting of such application, it shall grant such application. These criteria are presently included in section 309 of the act and are set forth in S. 1898 as passed by the Senate. The language in S. 1898 as passed by the Senate provided in subsection 309(a)(1) that "No application provided for in sections 308, 310(b), and 325(b) for an instrument of authorization for any station * * *." Since the specific references to subsections 310(b) and 325(b) present some drafting problems and since the wording of those subsections makes it clear that the procedural provisions of section 309 apply to applications filed pursuant to those sections, the specific references to sections 310(b) and 325(b) were deleted in the revision of S. 1898 by your committee. However, this makes no substantive change.

Section 309(b), in the committee substitute, provides that no application for an instrument of authorization in the case of a station in the broadcasting or common carrier services or any of several specific categories in the safety and special radio services, may be granted by the Commission earlier than 30 days following the issuance of a public notice by the Commission of its acceptance for filing or any substantial amendment thereof. This proviso is not presently included in the act. It is designed specifically to give interested parties an opportunity to learn of the application and to file a "petition to deny" as provided for by proposed subsection (d).

Subsection (c) of section 309, in the committee substitute, lists several specific exceptions to the 30-day waiting period required by subsection (b). These specific exceptions deal with situations where the matters considered are of minor concern and where the 30-day waiting period and the filing of a petition to deny would serve no useful purpose.

These specific exceptions were set forth in S. 1898 as approved by the Senate as a proviso to subsection 309(a)(1). It is the view of your committee that these exceptions to the 30-day waiting period requirement should be set out in a separate subsection and this change has been made.

Section 309(d)(1), in the committee substitute, provides that any party in interest may file with the Commission a petition to deny any application, whether as originally filed or as amended, to which subsection (b) applies. Such petition may be filed at any time prior to the day of Commission grant without a hearing. It further provides that the petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with the criteria set forth in subsection (a). It requires further that such allegations of fact, except as to matter of which the Commission may take official notice, shall be supported by affidavit of personal knowledge thereof. In the judgment of your committee this provision is a marked improvement over the existing statutory provision contained in 309(c), which has been interpreted by the Commission to permit allegations to be made on information and belief. This practice has resulted in serious and disruptive procedural abuses. Subsection (d)(1) also provides that the applicant shall be given an opportunity to file a reply and requires that any allegations of fact or denials shall be supported by affidavits of persons with personal knowledge thereof.

Subsection (d)(1) also provides that with respect to any classifications of applications the Commission may from time to time by rule specify a cutoff date, for the filing of petitions to deny, earlier than the day upon which the Commission grants the application without a hearing, but in no circumstances less than 30 days from the date upon which the application was accepted for filing. The purpose of this is to take care of situations where applications, because of large backlogs, may be kept on file for extended periods of time, thus affording ample opportunity for any party in interest to file a petition to deny before the application is reached for processing, and where to delay the filing of petitions to deny until the actual date of grant would result in unnecessary delay in the handling of applications. The substance of this subsection is included in S. 1898 as passed by the Senate.

Subsection (d)(2) provides that if the Commission finds after consideration of the application, the pleadings filed or other matters of which it may officially notice, that a grant of the application would be consistent with subsection (a) it shall grant the application, deny the petition, and issue a concise statement of the reasons for denying the petition which shall dispose of all substantial issues raised by the petition. This language was included to assure the petitioner that issues raised by his petition would be considered and disposed of by the Commission prior to granting the application concerned without a hearing, but at the same time to afford the Commission an opportunity to dispose of those petitions which were of no real consequence by brief orders or opinions as the circumstances may warrant without the necessity for a formal hearing.

Subsection (d)(2) further provides that if a substantial and material question of fact is raised or if the Commission for any other reason is unable to find that a grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e). The purpose of this language is to make it absolutely clear that the application will be designated for hearing before a grant in any case where a substantial and material question of fact is raised by the petition and not disposed of by the reply.

Subsection (e) provides that if, in case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission is for any reason unable to make the finding specified in subsection (a), it shall designate the application for hearing on the grounds and reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements raised generally. This section also makes provision for any party in interest who may not have been so notified by the Commission to acquire the status of a party to the proceeding by filing a petition to intervene. It further provides that any hearing so held shall be a full hearing and that the burden of proceeding with the evidence shall be upon the applicant, except with respect to any issue presented by a petition to deny or a petition to enlarge the issues. In such cases, the burden of so proceeding is to be as determined by the Commission. The substance of this subsection is presently embodied in section 309 of the act and in S. 1898, as passed by the Senate.

Subsection (f) provides an opportunity for the Commission to handle special authorizations in those rare cases where to wait the 30 days specified in subsection (b) of this section would be detrimental to the public interest. Action under this subsection may be taken only when the Commission finds that there are extraordinary circumstances requiring emergency operation in the public interest and the authority granted hereunder may not exceed 90 days. However, an extension of this authority for an additional 90 days upon appropriate findings may be granted, but no further extensions thereafter may be made. It is believed that if the emergency has not subsided within the 180-day period provided in this subsection, the Commission will have had an opportunity to consider an application filed in due course and any petitions to deny filed in response thereto. This provision was included in S. 1898 as passed by the Senate.

Subsection (g) authorizes the Commission to adopt reasonable classifications of applications and amendments to carry out the purposes of the section. This provision was in S. 1898 as passed by the Senate.

Subsection (h) is essentially the same as subsection (g) in S. 1898 as passed by the Senate and subsection (d) of existing section 309 of the act.

Section 3(b) of the committee substitute merely makes editorial modifications in section 319 of the act to take account of the changes being made in section 309.

Section 3(c) of the committee substitute would amend section 405 of the Communications Act (1) by correcting an obvious typographical error in the first sentence which was inadvertently inserted during the 1952 amendments, (2) by adding a specific requirement that the Commission enter an order with a concise statement of the reasons for denying or granting a petition for rehearing in whole or in part, and (3) by adding a requirement that in those cases where the petition relates to an instrument of authorization granted without a hearing, the Commission shall take action within 90 days of the filing of such petition. This subsection is identical to section 3 of S. 1898 as passed by the Senate.

Section 3(d)(1) of the committee substitute provides that section 3 (a) and (b) shall not take effect until 90 days after the enactment date. This should give the Commission ample opportunity to establish the necessary procedures for handling petitions to deny.

Section 3(d)(2)(C) of the committee substitute provides that the Commission may by rule provide a reasonable opportunity for the filing of petitions to deny in accordance with section 309 of the act, as amended by section 3(a) of the committee substitute, after the effective date of such section 3(a), in the case of any application or class of applications which were filed prior to such effective date and not substantially amended on or after such date.

Section 3(d)(3) of the committee substitute provides that section 309 of the act, as in effect immediately before the effective date of section 3(a) of the committee substitute, shall apply only to applications which were filed before such effective date and have not substantially been amended after such effective date and with respect to which the Commission has not by rule provided for the filing of petitions to deny as provided in section 3(d)(2)(C).

Section 3(d)(4) of the committee substitute provides that the amendment made by section 3(c)(2) shall apply only to petitions for a rehearing filed on or after the date of the enactment of S. 1898.

SECTION 4—LOCAL HEARINGS; PAYOFFS

Local hearings

A staff study prepared for the Special Subcommittee on Legislative Oversight in the 85th Congress stressed the importance of hearings by the FCC in all cases involving television station grants and transfers.[1] In its final report, that subcommittee recommended that section 307 of the Communications Act of 1934 be amended to require a public hearing at which all interested parties shall be afforded an opportunity to be heard before the issuance of any television license.[2] This recommendation was renewed a year later, with the further stipulation that the hearing be held in the community in which the station is to be located.[3]

Chairman Ford of the FCC testified before the Subcommittee on Communications and Power that in many cases there are no competing applications and no opposition to the grant; and that the requirement of a hearing in every case would greatly increase the workload of the Commission. He agreed, however, that the Commission should consider community needs as to programing; that there would be situations where the Commission would find it necessary to conduct hearings; and that where such hearings are necessary it may well be that the information sought can more effectively be obtained by holding the hearing in the area to be served by the station.[4]

In the light of these considerations the committee is proposing certain changes in section 311 of the Communications Act of 1934.

Section 4(a) of the committee substitute would amend section 311 of the act so as to authorize the Commission to hold hearings at a place in, or in the vicinity of, the principal area to be served by the station involved in such hearing if the Commission determines that the public interest, convenience, or necessity would be served by conducting such local hearing.

As amended by such section 4(a), section 311 of the act would also require applicants for most instruments of authorization in the broadcasting service to give notice of the filing of their applications, and, if any such application is designated for hearing, to give notice of such hearing. Each such notice would be given in the principal area which is served or is to be served by the broadcast station with respect to which such application is filed. The Commission would prescribe by rule the form and content of such notices and the manner and frequency with which they are given.

Payoffs

In 1959 and again in 1960, the Special Subcommittee on Legislative Oversight recommended that the Communications Act of 1934 be amended to prohibit direct or indirect payoffs of competing applicants

[1] Robert S. McMahon, "Regulation of Broadcasting—Half a Century of Government Regulation of Broadcasting and the Need for Further Legislation, a Study for the Committee on Interstate and Foreign Commerce, House of Representatives," 85th Cong., p. 165 (1958).
[2] H. Rept. No. 2711, 85th Cong., p. 12 (1959).
[3] H. Rept. No. 1258, 86th Cong., p. 39 (1960).
[4] Hearings before Subcommittee on Communications and Power, Committee on Interstate and Foreign Commerce, House of Representatives, 86th Cong., pp. 29, 70 (1960).

except in the proved amount of out-of-pocket expenses.[5] This recommendation was based on testimony head by that subcommittee concerning numerous comparative TV cases before the FCC in which competing applications were dismissed pursuant to merger of, or agreement between, applicants. Frequently these agreements involve payoffs either in cash, stock, stock options, or other consideration. In one case, the promoters of a corporation which filed an application for a TV channel long after the original application for that channel was filed, were paid $200,000 over and above their expenses, to withdraw their application.[6]

The FCC has taken cognizance of this problem. On June 26, 1958, it adopted a notice of proposed rulemaking to amend the Commission's rules to provide that whenever consideration, including an agreement for consolidation of interests, is paid or promised in connection with the default, dismissal or amendment of a broadcast application in hearing status, the applications of the parties to the agreement will be dismissed with prejudice. The FCC cited the increasing number of broadcast cases designated for comparative hearing in which competing applications were being amended or dismissed upon agreement for the payment of some consideration or for consolidation of interests, leaving the remaining application free for an unopposed grant. It expressed concern that such practices may tend to defeat the purpose of hearings on applications for broadcast facilities and may encourage the filing of marginal or strike applications in the hope that payment may be exacted in consideration of the amendment or dismissal of such applications. This proceeding is still pending.[7]

Section 4(a) of the committee substitute would amend section 311 of the act so as to make it unlawful, without approval of the Commission, in any case where two or more applications for a construction permit for a broadcasting station are pending and only one application can be granted, for the applicants to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications. The agreeing parties would be required to submit to the Commission full information with respect to the agreement which would have to be set forth in such detail, form, and manner as the Commission shall by rule require.

The Commission may approve such agreement only if it determines that it is consistent with the public interest, convenience, or necessity. If an agreement contemplates the making of any direct or indirect payment to any party thereto in consideration of his withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience, or necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been or to be legitimately and prudently expended in connection with the prosecution of such application.

[5] H. Rept. No. 2711, 85th Cong., p. 11 (1959); H. Rept. No. 1258, 86th Cong., p. 39 (1960).
[6] Testimony of Robert McMahon, hearings before Special Subcommittee on Legislative Oversight, Committee on Interstate and Foreign Commerce, House of Representatives, 85th Cong., pt. 8, pp. 2943–2947, 1971–2977 (1958).
[7] Testimony of Hon. Frederick W. Ford, hearings before Subcommittee on Communications and Power, Committee on Interstate and Foreign Commerce, 86th Cong., p. 33 (1960).

SECTION 5—SUSPENSION OF LICENSES

Generally speaking, the one administrative sanction which the FCC is presently authorized to invoke against a broadcast licensee who flouts the law is to revoke his license. That, of course, amounts to a death sentence for the licensee. It may also have a serious effect upon the community served by the licensee. Because of its severity, it has seldom been invoked. The discovery that some licensees have violated the law with impunity has encouraged others to do likewise.[1]

To remedy this situation, the Attorney General and the FCC have recommended that the Commission be authorized to impose less severe sanctions, such as temporary suspension of licenses.[2]

The Special Subcommittee on Legislative Oversight recommended that the FCC be empowered to suspend licenses for brief periods.[3]

Section 5(a) of the committee substitute would amend the act to empower the Commission to suspend station licenses for a period of not more than 10 consecutive days for the same acts that station licenses could be revoked for. However, the provisions relating to revocation are different from those relating to suspension in that the latter do not require that any such act must have been done knowingly, willfully, or repeatedly.

[1] Testimony of Robert S. McMahon, hearings before Special Subcommittee on Legislative Oversight, Committee on Interstate and Foreign Commerce, 85th Cong., pt. 13, pp. 4936–4937 (1958).

[2] H. Rept. No. 1258, 86th Cong., p. 65 (1960); hearings before Subcommittee on Communications and Power, Committee on Interstate and Foreign Commerce, House of Representatives, 86th Cong., pp. 64–67 (1960).

[3] H. Rept. No. 1258, 86th Cong., p. 36 (1960).

SECTION 6—ANNOUNCEMENTS REQUIRED BY SECTION 317; DISCLOSURE

Section 6(a) of the committee substitute rewrites section 317 of the Communications Act of 1934 which requires announcements to be made with respect to certain matter which is broadcast.

Section 6(b) of the committee substitute amends title V of the act by adding a new section 508 at the end thereof. Such section 508 wou d require the disclosure of certain payments made to persons other than station licensees for the broadcasting of matter. Such disclosure is required in order that announcements may be made as provided in section 317, as rewritten by section 6(a), the committee substitute.

Announcements required by section 317

The amendment of section 317 of the act by section 6(a) of the committee substitute is a result of a recommendation of the Special Subcommittee on Legislative Oversight. The subcommittee, on page 39 of its interim report [1] issued February 9, 1960, recommended as follows:

> Section 317 should be amended to require announcement of payments made not only to licensees but also to any other individuals or companies for advertising "plugs" on behalf of third parties on sponsored programs. Provision should be made to prohibit payment to any person or company or the receipt by any person or company for the purpose of having included in a broadcast program any material, whether vocal or visual, without having announcement made on the program that the showing or hearing of such material has been paid for. Criminal penalties should be imposed upon any person or company who violates this section as amended.

The subcommittee's recommendation was based in part on evidence presented at its hearings on television quiz show programs (Nov. 4 and 5, 1959) and in part on voluminous evidence in its files. The latter material furnished the subject matter for public hearings held in February, April, and May, 1960 on "payola" and related improper practices in the broadcast and phonograph record industries.

The subcommittee's concern over the use of surreptitious payments of money, fees, or other valuable consideration to influence program content grew out of the so-called "Hess incident" disclosed during the hearings on television quiz shows. Testimony before the subcommittee showed that the owner of the Hess Bros. Department Store of Allentown, Pa., paid $10,000 in cash to Elroy Schwartz of Louis Cowan Productions to get one Kenneth Hoffer, then an employee of the Hess store, on the "$64,000 Question" as a contestant (transcript,

[1] H. Rept. No. 1258, "Investigation of Regulatory Commissions and Agencies," interim report of the Committee on Interstate and Foreign Commerce, Subcommittee on Legislative Oversight, 86th Cong., 2d sess., Feb. 9, 1960.

pp. 696–704, Nov. 4). This was arranged through a public relations counsel in New York City to whom the Hess store paid $5,000 for this and other services (transcript, pp. 722–726). No receipt was taken for the $10,000 paid to Mr. Schwartz (transcript, pp. 706–709). Nor was this payment recorded on the books of the store or of its owner (transcript, p. 770). Max Hess, the owner, and David Gottlieb, an employee who delivered the money to Mr. Schwartz, testified that it was their understanding that it was a common practice to make payments to get people on television shows (transcript, pp. 695–724). The purpose of paying the $10,000 was to obtain publicity for the store through Hoffer's identifying himself as one of its employees (transcript, p. 858, Nov. 5). Both Mr. Hess and Max Levine, public relations manager for the Hess Bros. Department Store, testified that numerous payments had been made to obtain mention of the store or its products on radio and television shows not sponsored by the store (transcript, pp. 741–752, Nov. 4; transcript, pp. 863–880, Nov. 5). No public announcement was made by anyone that Mr. Hoffer's appearance on the "$64,000 Question" was the result of a payment of money to a programing employee.

The subcommittee's hearings on "payola" and related unfair and deceptive practices were held on 19 days, January 27–28, February 8–10, February 15–19, March 4, April 26–29, and May 2–3. Fifty-seven witnesses were heard; they included diskjockeys and other programing personnel, network and licensee executive personnel, phonograph record manufacturers and distributors, independent data processors, trade paper representatives, songwriters and publishers, and members of the subcommittee staff.

Testimony revealed that much of the music heard on the air was selected by program personnel, not because of any belief that the music deserved on its merits to be heard, but as a result of payments of money, gifts, etc., to programing personnel. These payments were rationalized as licensing fees and consultation fees.

Another situation explored in some detail by the subcommittee was that of an arrangement between American Airlines and a television producing company owned by Mr. Dick Clark (tr. 1945–1955, 2002–2004, May 2, and 2075–2087, 2122–2131, May 3, passim). American Airlines agreed to pay periodically to Mr. Clark's producing company amounts aggregating some $7,000 over the contract term. In return, the airline was given a credit at the end of Mr. Clark's Saturday night television program to the effect that "travel for the Dick Clark show [was] arranged through American Airlines." Mr. Clark was to use the sums paid by American Airlines to purchase space for air travel connected with the program. In fact, not all the $7,000 was used for air travel with the result that Mr. Clark's production company made a profit of $3,049.60 on the transaction (tr., insert following 2012). Mr. Clark described the American Airlines contract as "a casually accepted practice in the business."

Mr. Leonard Goldenson, president of American Broadcasting-Paramount Theatres, Inc., and its American Broadcasting Division, over whose network facilities Mr. Clark's program was broadcast, testified on May 5 that the American Airlines contract had the approval of ABC.

The foregoing illustrations from testimony before the Special Subcommittee on Legislative Oversight explain why the committee believes it necessary that section 317 be expanded.' The section as it has existed since the Federal Radio Act appears to go only to payments, etc., to licensees as such. The fact that licensees now delegate much of their actual programing responsibilities to others makes it imperative that the coverage of section 317 be extended to those in fact responsible for the broadcast matter.

As a result of the investigation by the Special Subcommittee on Legislative Oversight the Federal Communications Commission on March 16, 1960, issued a public notice entitled "Sponsorship Identification of Broadcast Material." (See Appendix.)

In this Public Notice the Commission interpreted the provisions of section 317 as requiring an announcement in situations involving gifts to licensees of matter to be exposed in the course of broadcasts by such licensees. Such interpretation of the provisions of section 317 would require, for example, an announcement of the fact that a phonograph record played by a radio station was given to such station by the XYZ company.

The radio and television industry strongly opposed this interpretation of section 317, a provision which, in its original form, had been enacted in 1927 and which up to this point had never been so interpreted by the Commission.

The amendment to section 317 and the accompanying disclosure provisions are aimed at (1) preventing recurrences of the extreme types of "payola" situations uncovered by the Special Subcommittee on Legislative Oversight, and (2) avoiding some of the hardships which have resulted from the Commission's interpretation of the present language of section 317 as set forth in the Commission's Public Notice of March 16, 1960.

Section 317 of the Communications Act of 1934 is a carryover of section 19 of the 1927 Radio Act, which in turn was based upon the Postal Act of 1912. That act, dealing with second-class mailing privileges, provides, in pertinent part, that—

> All editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked "advertisement" * * * (39 U.S.C. § 234).

The intent of Congress in enacting the 1912 act, as well as the relevant sections of the two broadcasting statutes, was to require that paid advertising or paid propaganda should be designated as such in both media.

The committee does not believe the public interest requires—nor does the committee believe it was the intent of earlier Congresses in enacting the statutes referred to above to require—an announcement where matter is merely furnished to a broadcaster without charge or at a nominal cost for use on or in connection with a broadcast.

It must be recognized that the mere exposure on the air, either by radio or by television, of a record or a prop may, in itself, provide some derivative promotional benefit to the product. However, if the broadcaster had purchased the record or had purchased the prop for use on a program, the identical derivative promotional benefit would accrue to the product. In short, some derivative promotional benefit is inherent in the very use of any product or service in the broadcast media, just as a similar derivative promotional benefit may accrue to the supplier of matter to a newspaper when the newspaper uses such matter as a part of its news coverage.

It follows that no announcement should be required even though the property or services are furnished to a broadcaster with an understanding that the matter so furnished is to be used by the broadcaster on a program. (In this situation there is nothing paid or given by way of money, services, or property in addition to the services or property furnished for use on the program.) Indeed, to require an announcement would result in making a further identification of the supplier or his product, and would serve no public interest consideration so far as the listeners or viewers are concerned.

There is, however, another situation in which the property or services are furnished not only in consideration for their use on the program but also in return for an advertising message (i.e., a sales "pitch" or "plug") in behalf of the supplier. In this situation the agreement embraces not only the use of the property or services on the air, but the giving of an advertising message. Here the public interest requires an announcement to be made since the advertising message has in effect been paid for by the supplier in furnishing his services or property. The advertising message in this instance is more than the broadcaster would have included in the program had he purchased the service or property used on the broadcast. Such advertising message is not reasonably related to the use of such service or property on the broadcast.

The provision contained in section 317(a)(1) (p. 24), lines 8 through 14 of the committee print of S. 1898, dated June 3, 1960) is substantially identical with present law. The proviso which follows seeks to exempt in general language from the announcement requirement certain situations involving the furnishing of services or property to licensees without charge or at a nominal charge for use on or in connection with broadcasts. The intended effect of the proviso is illustrated in the examples which appear below.

Section 317(a)(2)

This subsection makes it clear that the instant legislation is not intended to change the Commission's present requirement that an announcement be made in the case of any political program or any program involving the discussion of any controversial issue even where the program element is furnished without charge or at a nominal charge as an inducement to the broadcast of the program. Thus, an announcement in these circumstances may be required even though, in fact, the matter broadcast is not "paid" matter. However, the Commission in 1944, with the concurrence of the broadcast industry, promulgated a rule to this effect. The industry at no time has raised objection to the announcement requirement in these situations. In order to provide specific statutory authority for the requirement of an announcement here, we have included the substance of the Commission rule as subsection (a)(2) of amended section 317.

Examples illustrating application of proposed section 317.

In summary, under the proposed legislation an announcement would be required—

(1) Where payment in any form other than the matter used on or in connection with the broadcast is made to the station or to anyone engaged in the selection of program matter; and

(2) Even though there has been no such payment, where service or property is furnished for use on or in connection with a program, with an agreement, express or implied, that there will be an identification beyond that which is reasonably related to the use of the service or property on the program.

Illustrative of the application of these principles to typical specific situations are the following:

A. Free records[1]

1. A record distributor furnishes copies of records to a broadcast station or a disk jockey for broadcast purposes. No announcement is required unless the supplier furnished more copies of a particular recording than are needed for broadcast purposes. Thus, should the record supplier furnish 50 or 100 copies of the same release, with an agreement by the station, express or implied, that the record will be used on a broadcast, an announcement would be required because consideration beyond the matter used on the broadcast was received.

2. An announcement would be required for the same reason if the payment to the station or disk jockey were in the form of cash or other property, including stock.

3. Several distributors supply a new station, or a station which has changed its program format (e.g., from "rock and roll" to "popular" music), with a substantial number of different releases.[2] No announcement is required under section 317 where the records are furnished for broadcast purposes only; nor should the public interest require an announcement in these circumstances. The station would have received the same material over a period of time had it previously been on the air or followed this program format.

4. Records are furnished to a station or disc jockey in consideration for the special plugging of the record supplier or performing talent beyond an identification reasonably related to the use of the record on the program. If the disc jockey were to state: "This is my favorite new record, and sure to become a hit; so don't overlook it," and it is understood that some such statement will be made in return for the record and this is not the type of statement which would have been made absent such an understanding, and the supplying of the record free of charge, an announcement would be required since it does not appear that in those circumstances the identification is reasonably related to the use of the record on that program. On the other hand, if a disc jockey, in playing a record, states: "Listen to this latest release of performer 'X,' a new singing sensation," and such matter is customarily interpolated in the disc jockey's program format and

[1] In view of the attention which has been given to the problem of free records, they are treated herein as a special category. It should be noted, however, that the same principles apply to records as to other property or services furnished for use on or in connection with a broadcast.

[2] A question has been raised with respect to a situation where a distributor furnishes to a station free of charge an entire music library with the understanding, express or implied, that only its records would be played on the station. To the extent that such an arrangement may run afoul of the antitrust laws or may constitute an abdication by the station of its licensee responsibility, an announcement under sec. 317 would not cure it.

would be included whether or not the particular record had been purchased by the station or furnished to it free of charge, it would appear that the identification by the disc jockey is reasonably related to the use of the record on that particular program and there would be no announcement required.

B. Where payment in any form other than the matter used on or in connection with the broadcast is made to the station or to anyone engaged in the selection of program matter

5. A department store owner pays an employee of a producer to cause to be mentioned on a program the name of the department store. An announcement is required.

6. An airline pays a station to insert in a program a mention of the airline. An announcement is required.

7. A perfume manufacturer gives five dozen bottles to the producer of a giveaway show, some of which are to be identified and awarded to winners on the show, the remainder to be retained by the producer. An announcement is required since those bottles of perfume retained by the producer constitute payment for the identification.

8. An automobile dealer furnishes a station with a new car, not for broadcast use, in return for broadcast mentions. An announcement is required; the car constituting payment for the mentions.

9. A Cadillac is given to an announcer for his own use in return for a mention on the air of a product of the donor. An announcement is required since there has been a payment for a broadcast mention.

C. Where service or property is furnished free for use on or in connection with a program, but where there is neither payment in consideration for broadcast exposure of the service or property, nor an agreement for identification of such service or property beyond its mere use on the program [3]

10. Free books or theater tickets are furnished to a book or dramatic critic of a station. The books or plays are reviewed on the air. No announcement is required. On the other hand, if 40 tickets are given to the station with the understanding, express or implied, that the play would be reviewed on the air, an announcement would be required because there has been a payment beyond the furnishing of a property or service for use on or in connection with a broadcast.

11. News releases are furnished to a station by Government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program. No announcement is required.

12. A Government department furnishes air transportation to radio newscasters so they may accompany a foreign dignitary on his travels throughout the country. No announcement is required.

13. A municipality provides street signs and disposal containers for use as props on a program. No announcement is required.

14. A hotel permits a program to originate on its premises. No announcement is required. If, however, in return for the use of the premises, the producer agrees to mention the hotel in a manner not reasonably related to the use made of the hotel on that particular program, an announcement would be required.

[3] In each of the examples listed under this heading, an announcement would appear to be required under the Commission's Mar. 16, 1960, public notice.

15. A refrigerator is furnished for use as part of the backdrop in a kitchen scene of a dramatic show. No announcement is required.

16. A Coca-Cola distributor furnishes a Coca-Cola dispenser for use as a prop in a drugstore scene. No announcement is required.

17. An automobile manufacturer furnishes his identifiable current model car for use in a mystery program, and it is used by a detective to chase a villain. No announcement is required. If it is understood, however, that the producer may keep the car for his personal use, an announcement would be required. Similarly, an announcement would be required if the car is loaned in exchange for a mention on the program beyond that reasonably related to its use, such as the villain saying: "If you hadn't had that speedy Chrysler, you never would have caught me."

18. A private zoo furnishes animals for use on a children's program. No announcement is required.

19. A university makes one of its professors available to give lectures in an educational program series. No announcement is required.

20. A well-known performer appears as a guest artist on a program at union scale because the performer likes the show, although the performer normally commands a much higher fee. No announcement is required.

21. An athletic event promoter permits broadcast coverage of the event. No announcement is required in absence of other payment by the promoter or agreement to identify in a manner not reasonably related to the broadcast of the event.

D. Where service or property is furnished free for use on or in connection with a program, with the agreement, express or implied, that there will be an identification beyond mere use of the service or property on the program [4]

22. A refrigerator is furnished by X with the understanding that it will be used in a kitchen scene on a dramatic show and that the brand name will be mentioned. During the course of the program the actress says: "Donald, go get the meat from my new X refrigerator." An announcement is required because the identification by brand name is not reasonably related to the particular use of such refrigerator in this dramatic program.

23. (*a*) A refrigerator is furnished by X for use as a prize on a giveaway show, with the understanding that a brand identification will be made at the time of the award. In the presentation, the master of ceremonies briefly mentions the brand name of the refrigerator, its cubic content, and such other features as serve to indicate the magnitude of the prize. No announcement is required because such identification is reasonably related to the use of the refrigerator on a giveaway show in which the costly or special nature of the prizes is an important feature of this type of program.

(*b*) In addition to the identification given in (*a*) above, the master of ceremonies says: "All you ladies sitting there at home should have one of these refrigerators in your kitchen," or "Ladies, you ought to go out and get one of these refrigerators." An announcement is required because each of these statements is a sales "pitch" not reasonably related to the giving away of the refrigerator on this type of program.

[4] Of course, in all these cases, if there is payment to the station or production personnel in consideration for the exposure, an announcement is required.

The significance of the distinction between the identification in (*a*) and that in (*b*) is, that in (*a*) it is no more than the natural identification which a broadcaster would give to a refrigerator as a prize if he had purchased the refrigerator himself and had no understanding whatever with the manufacturer as to any identification. That is to say, in situation (*a*), had the broadcaster purchased the refrigerator he would have felt it necessary, in view of the nature of the show, adequately to describe the magnitude of the prize which was being given to the winner. On the other hand, the broadcaster would not, where he had purchased the refrigerator, have made the type of identification in situation (*b*), thus providing a free sales "pitch" for the manufacturer.

24. (*a*) An airplane manufacturer furnishes free transportation to a cast on its new jet model to a remote site, and the arrival of the cast at the site is shown as part of the program. The name of the manufacturer is identifiable on the fuselage of the plane in the shots taken. No announcement is required because in this instance such identification is reasonably related to the use of the service on the program.

(*b*) Same situation as in (*a*), except that after the cameraman has made the foregoing shots he takes an extra closeup of the identification insignia. An announcement is required because the closeup is not reasonably related to the use of the service on the program.

25. (*a*) A station produces a public service documentary showing development of irrigation projects. Brand X tractors are furnished for use on the program. The tractors are shown in a manner not resulting in identification of the brand of tractors except as may be recognized from the shape or appearance of the tractors. No announcement is required since the identification is reasonably related to the use of the tractors on the program.

(*b*) Same situation as in (*a*), except that the brand name of the tractor is visible as it appears normally on the tractor. No announcement is required for the same reason.

(*c*) Same situation as in (*b*), except that a closeup showing the brand name in a manner not required in the nature of the program is included in the program, or an actor states: "This is the best tractor on the market." An announcement is required as this identification is beyond that which is reasonably related to the use of the tractor on the program.

26. (*a*) A bus company prepares a scenic travel film which it furnishes free to broadcast stations. No mention is made in the film of the company or its buses. No announcement is required because there is no payment other than the matter furnished for broadcast and there is no mention of the bus company.

(*b*) Same situation as in (*a*), except that a bus, clearly identifiable as that of the bus company which supplied the film, is shown fleetingly in highway views in a manner reasonably related to that travel program. No announcement is required.

(*c*) Same situation as in (*a*), except that the bus, clearly identifiable as that of the bus company which supplied the film, is shown to an extent disproportionate to the subject matter of the film. An announcement is required, because in this case by the use of the film the broadcaster has impliedly agreed to broadcast an identification beyond that reasonably related to the subject matter of the film.

27. (*a*) A manufacturer furnishes a grand piano for use on a concert program. The manufacturer insists that enlarged insignia of its brand name be affixed over normal insignia on the piano. An announcement is required if an enlarged brand name is shown.

(*b*) Conversely, if the piano furnished has normal insignia and during the course of the televised concert the broadcast includes occasional closeups of the pianist's hands, no announcement is required even though all or part of the insignia appears in these closeups. Here the identification of the brand name is reasonably related to the use of the piano by the pianist on the program. However, if undue attention is given the insignia rather than the pianist's hands, an announcement would be required.

Disclosure

The disclosure provisions which would be added to the act by section 6(b) of the committee amendment would extend the reach of section 317 so that it would apply whenever payments are made to station employees and others for the inclusion of matter in programs intended for broadcast. It would require any person giving or receiving money, services, or other valuable consideration for inclusion of any matter in a program to be broadcast by a licensee, to report such facts to the next person in the chain of program production and distribution, who in turn would be required to pass on the information until it finally reaches the licensee over whose facilities the program is broadcast. When such information reaches the licensee, subsection (b) of new section 317 would require the licensee to make an appropriate announcement regarding such payment.

SECTION 7—FORFEITURES

The breakdown of enforcement of the Communications Act of 1934 and of the rules and regulations issued thereunder because of the lack of less drastic sanctions than revocation of licenses has been previously adverted to in connection with the provisions pertaining to suspension of licenses. These considerations prompted the FCC to recommend that it be given the power to impose monetary forfeitures on broadcast licensees. It expressed the view that this would provide it with an effective tool in dealing with violations in situations where revocation or suspension does not appear to be appropriate.[1]

Section 7 of the committee substitute would amend the act to authorize the Commission to impose forfeitures of up to $1,000 a day for certain violations on licensees and permitees of broadcast stations.

[1] Hearings before Subcommittee on Communications and Power, Committee on Interstate and Foreign Commerce, House of Representatives, 86th Cong., pp. 65-67 (1960).

SECTION 8.—RIGGED QUIZ SHOWS

The hearings of the Special Subcommittee on Legislative Oversight on television quiz programs were held on 11 days, October 6–10 and 12 and November 2–6. It heard a total of 51 witnesses; network executives, producers, sponsors, advertising agency representatives, quiz show contestants, and the Chairmen of the Federal Communications Commissi n and the Federal Trade Commission.

The hearings disclosed a complex pattern of calculated deception of the listening and viewing audience.

Contests of skill and knowledge whose widespread audience appeal rested on the carefully nurtured illusion that they were honestly conducted were revealed as crass frauds. The public, whose rapt attention was sought and held by the spectacle of otherwise ordinary individuals exercising supposedly exceptional mental prowess, was gulled over a 3-year period. The sponsors of the programs reaped the competitive benefits they sought.

Sponsors, advertising agency representatives, and network officers conceded that they, too, had been tricked. The culprits were in each instance the independent producers of the shows. In order to obtain "an interesting and entertaining show," they resorted to tactics ranging in subtlety from selecting questions from a contestant's known field of knowledge to handing out questions and answers to a contestant in advance of the program.

It became clear to the subcommittee that the Communications Act of 1934, placing responsibility as it does solely on licensees, was inadequate. Since all the popular big-money programs were broadcast via national hookups, the individual licensees had no practical control over the shows or their production. The law presently places responsibility where it cannot practicably be exercised. In order to make it plain that such large-scale deception is incompatible with broadcasting in the public interest, the subcommittee recommended as follows: [1]

> 1. It is contrary to the public interest for a radio or television station to be used for broadcasting any program which purports to present a bona fide contest of knowledge or skill if, in fact, such contest or any part thereof is in any way rigged or fixed and if the program is produced or broadcast with intent to deceive viewers or listeners into believing that the contest is bona fide.
>
> It is therefore recommended that the Communications Act of 1934 be amended so as to make it a criminal offense for any person, with intent to deceive viewers or listeners, (1) to broadcast or participate in the broadcasting, or to produce or participate in the production for broadcasting, of any such program, or (2) to conspire with others to do any act so prohibited.

Section 8 of the committee substitute seeks to carry out this recommendation by prohibiting the rigging of purportedly bona fide contests of intellectual knowledge or intellectual skill. This provision would not be applicable to contests or exhibitions involving physical skill, such as wrestling matches.

[1] Interim report, supra, p. 38.

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., May 20, 1960.

Hon. OREN HARRIS,
Committee on Interstate and Foreign Commerce,
House Office Building, Washington, D.C.

DEAR CONGRESSMAN HARRIS: In your letter of May 18, 1960, you requested that the Commission review a proposal to amend section 317 and a disclosure statute which was drafted by attorneys for the networks and the National Association of Broadcasters. With reference to the proposed amendment to section 317, it appears that the proposed section 317(a)(1) down to the proviso is substantially the same as the present 317. The proviso reads: "*Provided,* That 'service or other valuable consideration' shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast."

The words "beyond an identification which is reasonably related to the use of such service or property on the broadcast" raise the problem as to the permissible degree of identification without the necessity of an announcement. The commentary which was enclosed with the proposed statute is of considerable assistance in determining the meaning of this language. We recognize that the matters the proviso intends to reach must necessarily contain broad language. It would appear that, if the committee report were to incorporate these pertinent portions of the commentary or provide similar and perhaps more specific guidelines, the Commission would be in a position to place a reasonable interpretation upon this general language.

Subsection 2 of the proposed section 317(a) would permit the Commission to continue in existence its rule regarding political programs or controversial issues.

Subsection (b) of the proposed section 317 relates over to the companion disclosure statute and would require an announcement of sponsorship where there had been obtained a consideration within the disclosure statute.

Subsection (c) of the proposed section 317 would require station licensees to exercise reasonable diligence to obtain from its employees and others information to enable the licensee to make appropriate announcement of sponsorship. The term "reasonable diligence" is appropriate in the circumstances, since it would require the licensee to take appropriate steps to secure such information, but it would not place a licensee in the position of being an insurer, nor does this condition permit a licensee to escape responsibility for sponsorship announcements by inactivity on his part. We believe that the term "reasonable diligence" has a sufficiently accepted legal meaning so as to permit the Commission to apply this standard in given factual situations.

Subsection (d) of the proposed section 317 provides the Commission shall waive the requirements of an announcement where the public interest, convenience, or necessity does not require an announcement. The Commission suggests that this language be altered by the deletion of "shall" and the substitution of "may". We would prefer to have the discretionary power implicit in the word "may" rather than the mandatory "shall" which may be construed as an affirmative duty to make a waiver.

Section (e) of the proposed 317 grants the Commission power to prescribe appropriate rules and regulations with reference to this section. The Commission is in accord with this portion of the bill.

Attached as page 3 to the proposed amendment of section 317 is an undesignated section which provides that subsection (b) of the proposed section 317 "shall not apply with respect to any money, service, or other valuable consideration, directly or indirectly paid, or promised, or charged, or accepted before the effective date of this Act." The proposed subsection (b), of course, deals with the companion disclosure statute. The Commission questions the value of this particular section since subsection (b) of section 317 is of no effect until actually enacted into law and it would seem that any activity forbidden by the disclosure statute or subsection (b) that continued after the anactment of this law as a result of an agreement entered into prior to the effective date of the statute should also come within the terms of the statute. Additionally, the argument might be made that this statute would have a retroactive effect and would discharge any responsibility for a violation of the present section 317 as it now stands. Accordingly, the Commission believes this portion of the statute should be deleted.

With reference to the disclosure statute, the Commission is in general agreement with the proposal, but we do wish to point out certain problems that may arise. For instance, with reference to section (b) the last three lines read:

"This subsection shall not apply to transactions between the payee and his employer, or between the payee and the person for whom such program is being produced."

Turning first to the phrase "between the payee and his employer" it is apparent that the object sought here is that the licensee would be free to discharge his responsibility and control the relationship between his station operations and his employees. However, there exists the possibility of dual employment. Consider, for example, the possibility of a station licensee employing a diskjockey who in turn is employed by a record manufacturer as a consultant. It would appear that this phrase may be broad enough to permit the diskjockey to escape the responsibility for reporting to the licensee if he were paid by the record manufacturer to give a record or records an inordinate amount of exposure. It would appear that the statutory language should be changed or, in the event that this is impracticable, the legislative history make clear the meaning of the phrase "between the payee and his employer." In the same sentence of subsection (b) the phrase appears "between the payee and the person for whom such program is being produced." This latter phrase is also of concern to the Commission because of situations which might arise. For example, assuming that an independent producer is producing a program for a network, it is clear that as between the producer and the network the subsection has a proper application in that the network will have the right to determine the material contained in program and would have full knowledge of any material which it might include in the program which would require an announcement. However, further assuming that an employee of the independent producer had some collateral interest in an unrelated business activity which he was able to give broadcast exposure as a result of his employment which was not readily ascertainable either by the independent producer or the network, it does not appear that such a situation is covered and that this type of transaction does not fall within any of the terms of the disclosure statute.

With reference to the final sentence of section (d) of the disclosure statute providing that an appropriate announcement shall constitute the disclosure required, the Commission believes that for the sake of clarity this sentence should appear as a separate subsection of the proposed statute.

Page 4 of the disclosure statute is an unidentified section, providing that section ---- "shall not apply with respect to any money, service, or other valuable consideration, paid or accepted before the effective date of this act or, to any agreement to pay or accept money, service, or other valuable consideration which was made before the effective date of this act." The Commission expresses the same concern with reference to this section as it did with reference to a previous section relating to a proposed section 317.

By direction of the Commission:

FREDERICK W. FORD, *Chairman.*

[FCC 60-239 Public Notice 85460]

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., March 16, 1960.

SPONSORSHIP IDENTIFICATION OF BROADCAST MATERIAL

Information supplied by broadcast licensees in answer to the Commission's recent inquiry concerning unannounced sponsorship of broadcast material, and other information before the Commission concerning such practices indicates that many station licensees have failed to comply with the requirements of section 317 of the Communications Act and with the Commission's rules promulgated thereunder. In many instances, such broadcasts resulted from practices of station employees and independent contractors, acting in their individual capacities. In these situations, questions are raised as to whether the licensee took reasonable steps to inform itself as to the type and nature of the material being broadcast by its station, and to assure itself that its operation met the sponsorship identification mandate of the act and the rules.

It is apparent that consideration has been provided in exchange for the broadcasting of various types of material without an accompanying announcement indicating that consideration was provided, and by whom, in exchange for or as an inducement for the particular broadcast. The information before the Commission indicates that, in general, such consideration was usually in one of the following forms: (1) recorded material provided to licensees and/or their employees and independent contractors for actual air use or for some other use by these groups (prizes to listeners, door prizes at "record hops" etc.); (2) promotion of outside activities in which a licensee, employee, or independent contractor participated and from which he received financial or other benefits; (3) acceptance of travel expenses, accommodations and other valuable consideration by a licensee or its employees or independent contractors in exchange for "plugging" a place, product, service, or event; and (4) payments for "plugs", expressed or implied, without accompanying revelation that the particular broadcast material was, in fact, sponsored.

Section 317 of the Communications Act reads as follows:

"All matter broadcast by any radio station for which service money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person."

Commission regulations promulgated thereunder are contained in sections 3.119, 3.289, 3.654 and 3.789 of the Commission's rules. The congressional intent in enacting section 317 of the Communications Act and similar antecedent legislation was clearly to prevent deception on the part of the public growing out of concealment of the fact that the broadcast of particular program material was induced by consideration received by the licensee. During the past 2 years, the Commission has had many occasions to consider the applicability of the above statute and rules, and has made its interpretations public. Consistently, these interpretations have contained the statement: "The Commission, of course, expects that in connection with all of the material presented over his station, the licensee will use reasonable diligence to ascertain the true sponsor and source of the material broadcast, and will disclose the same to the station's audience as required by the rules."

We call the attention of all licensees to the current notice of proposed rule making in the matter of amendment of sections 3.119, 3.289, 3.654 and 3.789 of the Commission's rules, released on February 8, 1960 (docket No. 13389), and the views expressed in the Commission's public notice of October 10, 1950, entitled "Sponsor Identification on Broadcast Stations" (6 Pike & Fischer RR 835).

With respect to the many prevalent practices revealed in licensee responses to the Commission's inquiry of December 2, 1959, and in other information before the Commission, it is evident that compliance with the act and the rules has not been attained. Accordingly, a discussion of these practices appears pertinent at this time.

FREE RECORDS

Information before the Commission indicates that virtually all broadcast stations receive some free musical recordings from manufacturers, distributors or other parties interested in promoting the recording itself or the performer or musical selection displayed thereon. The number of such recordings received, the charges to the station (if any), the number of copies of an *individual recording* received, the manner and degree of solicitation (if any) on the part of the station and other similar factors vary from station to station. The Commission's information indicates that, generally, stations in major metropolitan areas receive essentially all recordings free of charge; stations in smaller cities receive records at substantially reduced prices from manufacturers or distributors via "subscription services"; and the remainder of the stations secure few free records or subscription service records.

The Commission is of the view that the receipt of *any* records by a station which are intended by the supplier to be, or have the practical effect of being an inducement to play those particular records or any other records on the air, and the broadcast of such records, requires an appropriate announcement pursuant to section 317. This includes, but is not limited to, those situations in which a manufacturer, distributor or other person donates recordings (whether or not copies of the selections being played on the air) to the station as an inducement for exposure on the air of recordings handled by the same manufacturer or distributor. The Commission is of the view that, as a practical matter, quantities of records are given to broadcast stations for no other purpose than as an inducement to obtain preferential air exposure for certain recordings in which the donor has a financial interest—especially in those situations where a relatively large number of recordings are "donated" to a station for distribution to listeners as prizes, or to be given away at "record hops", etc.

The Commission is further of the view that an announcement must accompany the playing of any recording received under terms such as those outlined above, indicating that the station has received consideration and from whom for playing the particular recording and/or that the recording was furnished to the station, and by whom, as appropriate. An announcement merely stating the trade name on the record label, for example, without the added indication that consideration (in the form of the recording itself or otherwise) was supplied or furnished is insufficient. Only an announcement containing both of these elements, where applicable, provides the degree of information to the listening public contemplated by the Congress in enacting section 317. It follows then that compliance with said statute requires that an appropriate announcement accompany the playing of all recordings received free or at a nominal charge, and that a similar announcement be made when the station broadcasts recordings of a particular manufacturer, distributor, etc., who has provided other free records which the station utilizes in any nonbroadcast manner.

PROMOTION OF OUTSIDE ACTIVITIES

The most frequent activity falling into this category is the promotion of "record hops." These enterprises may be owned by the station licensee, by its employees, by outside parties, or by some combination thereof. If the station or its employees do not have the beneficial interest in the enterprise, the station personality acting as "record hop" master of ceremonies may receive a salary or portion of the profits. In some instances, the "record hop" may be a fund-raising activity of a charitable, civic, educational, or religious organization. Information before the Commission indicates that such "record hops" frequently feature the distribution of records (obtained free or at a substantial reduction in price by the station or its employees) as door prizes, and also that such presentations often utilize recording "talent" on a "live" basis, with the performer's fee paid by the station, its employee, or a record distributor. It is also noted that on many occasions the "talent" appears for a fee substantially less than the prevailing or union pay scale; or as a variation thereon, the operator of the "record hop" is partially or fully reimbursed by a record distributor or manufacturer for the fees paid to performers.

Obviously, where a disk jockey or station licensee anticipates a financial benefit to be derived from participation in a "record hop" enterprise, advance on-the-air promotion of the "hop" will stimulate larger attendance than could otherwise be expected. Past practices reveal widespread "record hop" plugging on stations where the station itself or its employees had some financial interest in these enterprises. Such announcements have usually been labeled "promotional" non-commercial spot announcements by the stations broadcasting them, or, in the extreme cases, no cognizance whatever has been given to these announcements, and they have not been entered on the station's logs on the theory that they were a part of the disk jockey's ad-lib "patter." It also appears that recordings by performers appearing at the "hop," or recordings distributed by the donor of free records to be given away at the "hop" may have been played at frequent intervals preceding the "hop" as a means of engendering in the listener a desire to purchase an admission ticket to the "hop" or in exchange for the cooperation of performers or donors of records. The probability of increased financial benefits accruing to the beneficial owners of and paid participants in these "record hops" as a result of broadcast promotion is readily apparent. Less direct, but just as financially advantageous are the benefits to performers, distributors and record manufacturers from air exposure in return for their contributions to the "record hop."

In light of the above, the Commission is of the view that appropriate announcements must accompany all broadcast material (announcements, playing of records, etc.) where a profit is to be derived from these "record hops," or where recorded or other broadcast exposure is being provided (whether based upon an express or implied agreement) in exchange for all or a part of a performer's fee or in exchange for the donation of records, prizes, hall rental, etc. Such announcements must identify the parties deriving financial benefit from the "record hop" as well as any other parties providing consideration in any form whatsoever in exchange for any of the above types of broadcast exposure. Although ostensibly it may appear that money, services or other valuable consideration is being provided gratuitously for use in some aspect of the presentation of the "record hop" itself, where such consideration is, in fact, provided for the purpose of or has the effect of inducing on-the-air "mentions" or "record spins," the accompanying announcement shall clearly state that such consideration is being provided, and by whom, in exchange for the broadcast presentation of one or more of these various types of program matter.

These sponsorship identification announcement requirements apply in connection with all "record hop" enterprises where any or all of the above commercial practices are involved, irrespective of the identity of the persons or nature of the organizations receiving the net proceeds of such "record hops."

TRANSPORTATION, ACCOMMODATIONS, "REMOTE" EXPENSES

The Commission's attention has been directed to the fact that transportation and accommodation expenses, and equipment operation and origination expenses incurred in "remote" pickups have been paid in part or in full by persons or organizations as an inducement to the broadcast of program material containing, for example, pictures or descriptions (which may or may not be accompanied by editorial comment or endorsement) of a place, product, service or event. Such payments may have either been made with the understanding that the product, event, etc., would be given broadcast exposure, or made in the hope that the person receiving the benefit would consider the matter of general interest or "newsworthy" and decide to provide broadcast coverage.

When inducements of the type set forth above result in the broadcast of any type of program material, it is especially important that an appropriate announcement be made. In such instances, the public may reasonably believe that the licensee considered the place, event, etc., to be of sufficient news or entertainment value so as to justify extraordinary expenditures in order to provide broadcast coverage when, in fact, consideration offered by a party or parties other than the licensee or commercial sponsor of the program was responsible, to a degree, for the decision to broadcast the particular program material.

The announcement contemplated in these situations should fairly disclose the fact that consideration was provided, and by whom, as an inducement for the broadcast presentation. This type of announcement is anticipated in those instances where the consideration is given with the understanding that certain broadcast coverage would be provided, and also where consideration has been given with the hope that broadcast exposure would result when, in fact, such exposure does occur.

The Commission wishes to distinguish between situations where the program material alone (for example, a "travel" film produced by a chamber of commerce) is provided to a licensee for air use, and situations where consideration other than or in addition to the program material itself (for example, a trip to a resort) is provided as an inducement to the licensee or its employees or independent contractors to broadcast certain matter. The former requires an announcement that the program or film was furnished to the licensee for broadcast use; the latter necessitates the additional revelation that consideration was provided in return for or as an inducement to the broadcast of the particular program material.

The Commission is compelled to reject the contention advanced by some licensees that in the above situations no announcement is required because such "favors" are "normal business practices" and because no more benefits are derived by broadcast personnel than accrue to members of the press, etc., who regularly are given this type of "junket." These arguments are wholly without merit by reason of the fact that certain requirements not applicable to other forms of communication have been imposed by the Congress on broadcast stations. The acceptance of such gratuities is in no way proscribed so long as the announcement required by the statute is properly made.

"PLUGS" AND "SNEAKY COMMERCIALS"

Instances have come to the Commission's attention in which "trade out" announcements—announcements in exchange for which the station receives services or products—have failed to disclose the fact that the particular matter broadcast is commercial and is supported by some form of consideration. For example, the Commission considers such statements as, "Travel arrangements made through Trans-State Airways" to be the substance of the "plugs" themselves. Such announcements do not indicate that consideration (free transportation) was provided in exchange for the particular broadcast exposure or "plug."

Similarly, absent an appropriate announcement, compliance with section 317 is lacking in arrangements for the barter of air time involving the exchange of cash, products or services for broadcast exposure of certain products or services (e.g., closeups of certain brands of typewriters on TV newscasts in exchange for the loan, free of charge, of typewriters for use in the station's offices) in which the commercial aspect of the presentation is not apparent. Additionally, such exposure may imply an endorsement of the particular product by the broadcast licensee. When, in fact, such objects are shown because of some financial benefit accruing thereby to the licensee, its employees or independent contractors, the listening and viewing public is entitled to the knowledge that such is the case, in order that it may view such a commercial presentation in its true context.

It has come to the Commission's attention that intentional, indirect references have been made to certain products in syndicated "interview" and other types of programs. For securing the broadcast of such "plugs," the producer, program packager, or "public relations" organization receives a fee from the particular sponsor involved. In some instances, it appears that the licensee broadcasting the program not only failed to receive revenue for this commercial use of its facilities, but in addition neither the licensee nor its audience may have been aware that the matter broadcast was deliberate commercial advertising. In this connection, the Commission has also been advised that networks and other producers and suppliers of program material have made surcharges (in the form of products and "promotional fees") for the publicity value to a manufacturer resulting from a showing and description of his product on television programs. For example, the manufacturer of a refrigerator to be awarded as a prize on a giveaway program may be required to provide a number of extra refrigerators and may be charged a "promotional fee" for the broadcast exposure of his product. The Commission wishes to indicate to producers or suppliers of such programs that it considers this matter a serious one inasmuch as such practices, engaged in without the knowledge of the stations broadcasting such programs, have the effect of preventing individual licensees from complying with the Commission's sponsorship identification and logging requirements.

On September 9, 1959, the Commission released a memorandum opinion and order denying a petition for rulemaking permitting the utilization of "teaser" announcements without sponsor identification of each such announcement. However, it has come to the attention of the Commission that practices similar to the broadcasting of "teaser" announcements have been utilized subsequent to the date of this order. We wish to emphasize that, in addition to "teaser" announcements, the broadcast of any similar commercial matter, such as that in the form of the playing of an instrumental version of a commercial jingle—associated exclusively with the sponsor holding the copyright to the musical jingle—without explicit identification of the sponsor, is likewise proscribed.

We also believe that, in light of the above discussion, it should be obvious that such practices as periodically playing a song from a current motion picture, when such is inspired by an express or implied agreement with a local theater or distributor to do so (or as a "bonus" for purchasing a number of spot announcements advertising the movie) and is not accompanied by an appropriate sponsorship announcement, violate section 317 of the act.

Responses to the Commission's inquiry of December 2, 1959, indicate that questions exist concerning compliance with section 317, compliance with the Commission's station log requirements, and possible abdication of licensee responsibility in the selection of program material, as well as character qualifications of licensees. The Commission recognizes that in some instances, noncompliance with the provisions of section 317 may have resulted from a misinterpretation of that section and in other instances negligence on the part of the licensee in carrying out his responsibilities or a failure to maintain adequate supervision on the part of management, or reliance on what has been termed "accepted industry practices." While the Commission is not delineating precise situations or circumstances which will warrant the imposition of sanctions for past violations of section 317 of the act, the Commission will not consider the reasons illustrated above as a sufficient excuse for noncompliance occurring in the future. Cases now before the Commission involving willfulness, misrepresentation, or serious neglect on the part of the licensee or other circumstance indicating a failure to exercise the proper degree of licensee responsibility will be considered by the Commission on a case-to-case basis and appropriate action will be taken in each case. However, pending final action on the proposal advanced in Docket 13389, the Commission expects its broadcast licensees to use the utmost diligence to apprise themselves of situations in which their employees or independent contractors have outside financial interests which are being promoted on the air and to act accordingly to require that appropriate announcements be made wherever section 317 is involved.

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